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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 74

CLIFFORD TAGGART, ET AL., *Petitioner*,

v.

WEINSTEIN'S INC., *Respondent*.

On Writ of Certiorari to the Supreme Court of Alabama

MOTION OF AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

and

BRIEF OF AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

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MOTION OF AMERICAN RETAIL FEDERATION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

Comes now the American Retail Federation (hereinafter called "Federation") by its attorneys, Brice I. Bishop and Phil B. Hammond, and respectfully requests leave under Supreme Court Rule 42 to file a brief as *amicus curiae* supporting the position of Respondent and urging affirmance of the decision of the Supreme Court of Alabama for the following reasons:

1. The Federation is an organization composed of seventy-eight national and state retail associations.

The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

2. The Federation has previously appeared as *amicus curiae* before this Court in labor relations matters which affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriate standards for regulation by state courts in cases of shopping center picketing;[2] and the appropriate standards for issuance of a Board order to compel employers to bargain based on union authorization cards.[3]

The subject matter of the instant case—the appropriate standards for regulation by state courts in cases of picketing on the private premises of an individual store—is similarly a matter of substantial concern to the Federation. The large regional shopping center, such as that involved in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308, accounts for

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[1] Brief *Amicus Curiae* in *National Labor Relations Board* v. *United Insurance Company of America* 390 U.S. 254.

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees* v. *Logan Valley Plaza,* 391 U.S. 308.

[3] Brief *Amicus Curiae* in *Sinclair Company* v. *NLRB,* 395 U.S. 575, and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB* v. *General Steel Products, Inc.,* 395 U.S. 575.

only a small proportion of the total retail sales in the United States.[4] It is the instant case, therefore, rather than *Logan Valley* which potentially will establish the guidelines for most of the retail industry.

3. The interest of the Federation is predicated upon these substantial and far-reaching consequences of any result in the instant case. The concern of the *amicus* is that the Court, in formulating the principles to govern the particular dispute involved in the present case, should have the benefit of the Federation's experience and views, which may not otherwise be presented in the arguments of the parties,[5] in order to be aware of the broader ramifications of its decision herein.

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[4] As of January 1965, there was a total of 8,076 shopping centers in the United States. Approximately 60%, or 4925 of the centers, had a gross leasable area of less than 100,000 square feet. Another 25%, or 2,066 centers, had a gross leasable area of between 101,000 and 200,000 square feet. These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,076 centers were "medium size" (201,000 to 400,000 square feet); but 316 were "large" centers (401,000 to 800,000 square feet); and merely 73 of the 8,076 centers were super regional shopping centers with gross leasable area in excess of 800,000 square feet. Moreover, the large and regional shopping centers accounted for less than one-fourth of the estimated annual sales of all shopping centers and only a very small percentage of the total retail sales in the United States. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, Summer 1967, pp. 27-9.

[5] See, e.g., *United States* v. *White Motor Company*, 372 U.S. 253, 263 (1963), where in remanding a case involving territorial restrictions in manufacturer-retailer franchises, this Court stated that the territorial limitations "may or may not have that purpose or effect of stifling competition. We don't know enough of the economic and business stuff out of which these arrangements emerge to be certain."

4. Counsel for all parties have been requested to consent to the Federation's filing a brief as *amicus curiae*. Permission was obtained from Respondent but, by telephonic advice of December 23, 1969, counsel for Petitioner declined to grant such consent. If permission is granted to file a brief as *amicus curiae*, it will be short and relevant so that the Court's time will not be misspent.

Respectfully submitted,

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BRIEF OF AMERICAN RETAIL FEDERATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of seventy-eight national and state retail associations. The membership of these associations con-

sists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry. Through these associations, the Federation represents approximately eight hundred thousand retailers with close to six million employees.

The Federation has previously appeared as *amicus curiae* before this Court in labor relations matters which affected a wide variety of retail businesses. Matters of particular concern in which the Federation has filed *amicus curiae* briefs involved the appropriate standards for determining who is an independent contractor under the National Labor Relations Act;[1] the appropriate standards for regulation by state courts in cases of shopping center picketing;[2] and the appropriate standards for issuance of a Board order to compel employers to bargain based on union authorization cards.[3]

The subject matter of the instant case—the appropriate standards for regulation by state courts in cases of picketing on the private premises of an individual store—is similarly a matter of substantial concern to the Federation. The large regional shopping center, such as that involved in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308, accounts for only a small proportion of the total retail sales in the

[1] Brief *Amicus Curiae* in *National Labor Relations Board v. United Insurance Company of America*, 390 U.S. 254.

[2] Brief *Amicus Curiae* in *Amalgamated Food Employees v. Logan Valley Plaza*, 391 U.S. 308.

[3] Brief *Amicus Curiae* in *Sinclair Company v. NLRB*, 395 U.S. 575, and Brief *Amicus Curiae* on Behalf of Petition for Reconsideration in *NLRB v. General Steel Products, Inc.*, 395 U.S. 575.

United States.[4] The major sources of such sales, conversely, are either small shopping centers,[5] single urban stores,[6] discount stores[7] and so-called "highway

[4] As of January 1965, there was a total of 8,076 shopping centers in the United States. Approximately 69%, or 1925 of the centers, had a gross leasable area of less than 100,000 square feet. Another 25%, or 2,006 centers, had a gross leasable area of between 101,000 and 200,000 square feet. These two groups combined accounted for 57% of the shopping center business. Only approximately 700 of the 8,076 centers were "medium size" (201,000 to 400,000 square feet); but 316 were "large" centers (401,000 to 800,000 square feet); and merely 73 of the 8,076 centers were super regional shopping centers with gross leasable area in excess of 800,000 square feet. Moreover, the large and regional shopping centers accounted for less than one-fourth of the estimated annual sales of all shopping centers and only a very small percentage of the total retail sales in the United States. See Applebaum, *Consumption and the Geography of Retail Distribution in the United States*, Michigan State University Business Topics, summer 1967, pp. 27-9.

[5] *Ibid.*

[6] Retail sales in the Bureau of the Budget Standard Metropolitan Statistical Areas as of 1963 accounted for approximately 70% of the total national retail trade, and less than 18% of this figure was made in stores located in non-urban areas. *Id.* at 27-8. In these urban areas, single store retail enterprises, such as that involved in the instant case, and multi-tiered department stores, rather than large regional shopping centers, are the usual mode of retail operation.

[7] As of June 1966, there were 2,684 discount stores in the United States with annual sales approaching that of the combined large and regional shopping centers. Such stores had an average floor area of 64,000 square feet and, on the average, derived 22% of their sales from the sale of food items, such as that principally sold by the Respondent herein. *Id.* at 29-34. The significance of such stores was noted thusly by Prof. Applebaum:

> "The development cycle of discount stores has been very rapid—much faster than for supermarkets, shopping centers, and branch department stores. Supermarkets began to expand vigorously about thirty years ago. Shopping centers

retailers." Such retail establishments have in common with the large shopping centers a desire to maximize the accessibility of the public to their premises. It is an integral component of every retail business that it be freely open to the public; such openness is true of the parking lot as well as the selling area and of the giant regional shopping center as well as the small single-store establishment.

In other salient characteristics, however, there are significant differences between the *Logan Valley* type shopping center and other retail establishments. The latter operations may offer more than one line of merchandise, not through the medium of varied separate and independent operations, as in the case of a large shopping center, but instead by means of leased de-

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and branch department stores have had their dramatic growth for the past fifteen years. Discount stores have mushroomed, particularly during less than a decade, but their development has been uneven from state to state, just as in the case of shopping centers.

A large discount store with a food department is essentially a shopping center in itself, today and tomorrow . . ." *Id.* at 31 (emphasis supplied).

"Highway retailing" was described by Professor Applebaum as a typically free-standing . . . establishment . . . [which] depends entirely on automobile traffic passing by or going to the suburbs, the retail [establishment] is more dependent . . . Emphasis the author's. This "growth segment of the retail industry involves not only gasoline stations, restaurants and motels but, in addition, includes a proliferation in recent years of other types of business such as supermarkets, drug stores, variety stores, candy stores, furniture stores, garden supply stores, [gas stores, and still others, including] grocery stores. [While each of these stores] has one thing in common, they have ample space for automobile traffic and plenty of *parking space.*" *Id.* at 31 (emphasis supplied). Again, it appears that a substantial portion of the retail industry closely resembles the Weinacker's store involved in the present case rather than the large retail shopping center of *Logan Valley*.

ARGUMENT

I.

THE DECISION OF THE COURT BELOW DOES NOT ABRIDGE THE CONSTITUTIONAL RIGHTS OF PETITIONERS

The core of Petitioners' argument is the contention that "an employer who opens his property to the public—to customers in order to secure their patronage of his store and to others in the community to operate his store—cannot close his property to employees who seek by peaceful picketing in the immediate vicinity of the store to publicize the store's disfavored labor policy" (Pet. Br., p. 14).[10] This sweeping declaration is comprised of a series of unwarranted assumptions:

> *First*, it assumes that, once an employer opens his private property for any purpose to the public, he thereafter has an automatic corollary obligation *in every case* to permit peaceful picketing thereon.
>
> *Second*, it assumes that once an employer opens his private property for any purpose to the public, he thereafter has an automatic corollary obligation to permit peaceful picketing *at any site* thereon "in the immediate vicinity" which may be chosen by the pickets.

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[10] The Petitioners have properly confined the issue here involved to communication "for a purpose consonant with the use to which the property is actually put" (Pet. Br., p. 16), i.e., "to publicize [Weinacker's] disfavored labor policy." The Federation concurs with the Petitioners and Amicus Homart Development Co. that the separate and independent matter of communication for other purposes, a question specifically left unresolved in *Logan Valley* (391 U.S. at fn. 9), is not before the Court in the instant case and this brief, accordingly, will not address itself to that issue.

> *Third,* it assumes—and later directly admits (Pet. Br., p. 31)—that once an employer opens his private property for any purpose to the public, he thereafter has an automatic corollary obligation to permit peaceful picketing thereon *and the availability of effective alternative locations to engage in such activities is "irrelevant".*

These assumptions substantially distort the holdings, as well as the reasoning, of *Logan Valley* and its predecessors. They seek solace in an all-inclusive generalization to govern every situation. They fail to recognize, in short, the difficult but necessary responsibility of the courts to strike a balance, in the factual situation of each particular case, between the conflicting Constitutional rights at issue in this area of strongly-held feelings and concern.

A. There Is No Unfettered Right To Engage in Peaceful Picketing in All Places

This Court has repeatedly emphasized that "[a] state is not required to tolerate in all places . . . even peaceful picketing by an individual"[11] and that "[e]*ven where municipal or state property is open to the public generally,* the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State."[12] And certainly the power of Respondent "to make reasonable regulations governing the exercise

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[11] *Gibonev* v *The Empire Storage & Ice Co.*, 336 U.S. 490, 500-1, quoting *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 79 (emphasis supplied). See also *Hughes* v. *Superior Court*, 339 U.S. 460 and *Building Service Union* v. *Gazzam*, 339 U.S. 532.

[12] *Amalgamated Food Employees* v. *Logan Valley Plaza*, 391 U.S. 308, 320.

of First Amendment rights on [its] property . . . [is] at the very least co-extensive with the powers possessed by States and municipalities, and recognized in many opinions of this Court, to control the use of public property." [13]

The assumption that the Fifth Amendment rights of property owners must yield to the First Amendment rights of pickets in *every* instance where the property involved is open to the public generally has thus been conclusively rejected by this Court. The question here presented is a far different one: in what instances must there be such a subordination of the owner's property rights or, in other words, "in what circumstances can private property be treated as if it were public?" [14]

B. Reasonable Regulation of Picketing on Private Property Includes the Right To Limit the Place Thereof

The Petitioner's second assumption—that peaceful picketing must be permitted "in the immediate vicinity" of private property open to the public—presupposes that "openness of the property to public entry is the only viable standard" and that "[w]hat matters is whether the property has been opened to the public" (Pet. Br., pps. 23-4). But, as previously noted, both the interior and the exterior of retail establishments are by their very nature open to the public; "[a]ny store invites the patronage of members of the public interested in its products".[15] If such openness is the only "viable standard", then it must follow that there

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[13] *Ibid.*

[14] *Id.* at 332 (dissenting opinion of Mr. Justice Black).

[15] *Id.* at 339 (dissenting opinion of Mr. Justice White).

is an absolute right to picket on the checkout counters of a store, in the aisleways of the selling floor, in the customer pickup areas, on the loading dock or at any other location that the pickets may believe will have the maximum disruptive effect.

Surely this is not the rule. While the Court in *Logan Valley* did not there find it necessary to determine "the extent to which respondents are entitled to limit the *location* . . . of the picketing" (391 U.S. at 321; emphasis supplied), the clear implication of the decision is that in the appropriate case the employer would be entitled to impose such a limitation.[16] Indeed, both the Union[17] and the National Labor Relations Board,[18] as *amicus*, in *Logan Valley* readily conceded this point. And this Court in other cases has similiarly required that labor organizations accept less desirable means of communication where the method sought would either

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[16] Cf. *id.* at 328-9 (dissenting opinion of Mr. Justice Black):

> "It seems clear to me, in light of the customary way that supermarkets now must operate, that pickup zones are as much a part of the stores as the inside counters where customers select their goods or the checkout and bagging sections where the goods are paid for. I cannot conceive how that such a pickup zone, even by the wildest stretching of *Marsh* v. *Alabama*, 326 U.S. 501, would ever be considered dedicated to the public or the pickets . . . it would be just as sensible for this Court to allow the pickets to stand in the checkout counters, thus interfering with customers who wish to pay for their goods, as it is to approve picketing in the pickup zone which interferes with customers' loading of their cars."

[17] *Id.* at fn. 4. See also the decision of the lower court in *Logan Valley*, 425 Pa. 382, 227 A.2d 874, at fn. 5.

[18] Brief of *amicus* NLRB (at p. 17) which concedes that in the case of picketing in the interior of a store "the interest of the State in providing a remedy for that conduct is so great . . . that the State would not be barred from acting."

unduly infringe on the rights of other parties[19] or violate the legitimate public policies of the States.[20]

Numerous limitations have, in fact, been placed by the Board and courts on the right to picket, or even engage in less provocative forms of communication, in locations generally open to the public. For example, handbilling, an activity which Petitioners admit "involves no patrol and evokes no responses other than those which flow from the content of the appeal itself" (Pet. Br., p. 28), as well as other forms of union solicitation have been banned from the selling floor of department stores.[21] Unions have also been restricted from picketing in the immediate vicinity of multistoried buildings[22] and from engaging in "common situs" picketing.[23] All of these activities were sought to be conducted on what the union regarded as their "natural and effective place," and their prohibition may have resulted in creating a "*cordon sanitaire*" or "buffer between the communicant and his audience" as Petitioners claim to be the effect of the decision below. Yet in each case the communication was regulated, as it was here, because of its interference with

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[19] See, e.g., *Carpenters & Joiners Union* v. *Ritter's Cafe*, 315 U.S. 722.

[20] See, e.g., *Milk Wagon Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U.S. 287.

[21] *Marshall Field & Co.* v. *N.L.R.B.*, 200 F.2d 375 (C.A. 7, 1952); *May Department Stores*, 59 NLRB 976.

[22] *Cf. NLRB* v. *District 65, Retail, Wholesale Department Store Union*, 375 F.2d 745 (C.A. 2, 1967); *Gimbel Brothers, Inc.*, 100 NLRB 870.

[23] *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675; *Sailors' Union of the Pacific (Moore Dry Dock Co.)*, 92 NLRB 547.

the equally-protected rights of others and the availability of other effective channels of communication.

In *Logan Valley,* Justice White properly expressed concern that the Court "might draw a line between 'shopping centers' and other business establishments which have sidewalks or parking on their own property." [24] Similar concern might well also be expressed for those establishments which are located in an enclosed mall [25] or which have virtually indistinguishable concessions or leased departments contained in the interior of their store or which are located in a multi-story downtown building [26] or which, instead of operating their own parking lot, lease out this operation or provide for an alternative thereto such as compensating customers for the use of an adjacent public parking facility. All of these situations, as well as a myriad of others, are potential arenas where the First Amendment rights of pickets may clash with the Fifth Amendments rights of property owners.

Resolution of such conflicts cannot be accomplished by means of a rote formula or meaningless inquiry to

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[24] 391 U.S. at 339.

[25] See, e.g., the brief of *amicus* Homart Development Co. in the instant case.

[26] The fear of the majority in *Logan Valley* was that, if the picketing there desired was precluded, the effect would be to permit "businesses situated in the suburbs . . . [to] largely immunize themselves from . . . criticism by creating a *cordon sanitaire* of *parking lots around their stores*." Id. at 325. But do not the numerous retail operations and businesses open to the public which are located on other than the street floor of a multi-storied downtown building, or which are operated as concessions or leased departments within a downtown department store, similarly create a "*cordon sanitaire*" which "immunizes" themselves from similar criticism?

determine "the openness of the property to public entry" as Petitioners suggest. Rather, each case must be judged on its own facts and, as in *Logan Valley*, a balance obtained which seeks neither to "substantially hinder . . . the communication of ideas" nor to "significantly interfere . . . with the use to which the [private] property [is] being put by both respondents and the general public."[27] The remedy fashioned, accordingly, must "ensure non-interference with customers and employees, while enabling the union members to assemble sufficiently close to [the store] . . . to make effective their First Amendment rights."[28] When, as here, such an accommodation is reached and such a remedy fashioned, the picketing is properly enjoined without any abridgement of the pickets' Constitutional rights.

C. The Availability of Other Effective Alternative Channels of Communication as Well as the Undue Interference Occasioned by the Picketing Fully Justify the Remedy Fashioned by the Court Below

Contrary to the Petitioners' assumption, the availability of effective alternative locations for it to engage in its desired picketing is not an "irrelevant" consideration. While one may not be required to have "the exercise of his liberty of expression" abridged on the basis that it may be exercised elsewhere,"[29] there is, in fact no abridgment of any "liberty of expression" where effective alternative channels of communication are open. It was the very absence in *Logan Valley* of any such effective alternative which caused the Court

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[27] *Id.* at 323.

[28] *Id.* at 326 (concurring opinion of Mr. Justice Douglas).

[29] Pet. Br. at p. 31 citing *Logan Valley* (391 U.S. at 323-4).

in that case to find that the State restraint imposed "substantially hinder[ed] the communication of the ideas which petitioners seek to express" (391 U.S. at 323) and, in view of the absence of any countervailing claim to protection of the respondents' normal business operation, to conclude that the appropriate balance there necessary should be in favor of the plaintiffs. Similarly, it was the power and influence exercised by the *Marsh*[30] company town owner to censor the avenues of communication available to the town's inhabitants which was critical to the similar determination reached by the Court in that case. And, conversely, it was the availability of effective alternative forums which led to the contrary result in *Babcock & Wilcox*.[31]

The court below properly concluded that Petitioners had available here an effective alternative channel of communication: the safe public sidewalk located within view of those frequenting Respondent's store (App. to Pet. for Cert., p. 21a). It also properly concluded that there was a countervailing significant claim which could be made on behalf of Respondent for protection of its normal business operation: "obstruction of customers using store entrances is present here but not in [*Logan Valley* and *Marsh*]" (App. to Pet. for Cert., p. 15a). The balance the court struck was, therefore, an appropriate one which should not now be disturbed.

[30] *Marsh* v. *Alabama*, 326 U.S. 501.

[31] *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105.

II

THE DECISION OF THE COURT BELOW WAS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The Petitioners have further sought to immunize their conduct from state regulation by asserting that the area here involved has been pre-empted by the National Labor Relations Act [32] and thereby withdrawn from state power. This issue, "a variant of a familiar theme," requires that the Court once again "render . . . progressively clear" that "penumbral area" in which the Act has "left much to the states." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 239-40. Its resolution, to paraphrase *Linn* v. *United Plant Guard Workers*, 383 U.S. 53, 57, "entails accommodation of the federal interest in uniform regulation of labor relations with the traditional concern and responsibility of the State to protect its citizens against [obstructive picketing which substantially interfers with the normal business use of its citizens' property]."

This "penumbral area," as recognized by *Garmon* and subsequent decisions, extends beyond regulation of that activity which is not arguably subject to either Section 7 or 8 of the Act. The pre-emption doctrine also has "due regard for the presuppositions of our embracing federal system," [33] and, accordingly, "has never been rigidly applied to cases *where it could not fairly be inferred that Congress intended exclusive jurisdiction to be with the NLRB.*" [34] The recognized

[32] 61 Stat. 316, 29 U.S.C. § 141 *et seq.* (hereafter referred to as the "Act").

[33] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at 243.

[34] *Vaca* v. *Sipes*, 386 U.S. 171, 179 (emphasis supplied).

area in which "this Court has refused to hold state remedies pre-empted" thus includes state regulation where either "the activity regulated was a merely peripheral concern of the . . . Act," or alternatively, as clearly indicated by *Garmon*,[35] was a distinct, separate criterion, where the activity "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, [the Court] . . . could not infer that Congress has deprived the States of the power to act." *Vaca* v. *Sipes*, 386 U.S. at 180, and cases cited therein.

The pertinent inquiries in the instant case are, therefore, these: (1) did Congress intend that the Act should have regulatory pervasiveness over conduct which obstructs the normal business use of private property; (2) is such conduct remediable under the Act rather than an activity which is "a merely peripheral concern" of the Act; (3) is such conduct dissimilar from other matters of compelling state interest, such as imminent threats to the public order, mass picketing, unremedied libels and similar activities; and (4) will the assertion of state power in this area "entail a real danger of upsetting a federal regulatory scheme."[36]

Each of these questions, the Federation submits, must be answered in the negative. The main thrust of the *amicus* position is that when, as the result of picketing, significant interference occurs with the normal business use of private property so as to remove such picketing from the protection of the First Amend-

[35] 359 U.S. at 244, and also recognized as a separate test in *Linn* v. *United Plant Guard Workers*, 383 U.S. at 62-63.

[36] *Amicus* Brief of the NLRB, pp. 16-18.

ment, the activity then becomes a matter of overriding state concern which must necessarily be subject to the regulation of its courts. It is immaterial in such case what may be the cause of such interference; regardless of whether the interference results from disruptions on the selling floor, the blocking of automobiles entering the parking lot, the prevention of customers' ingress or egress or the assemblage of large groups of pickets in such a location as to preclude normal business activities, the conduct is a legitimate subject for the exercise of state jurisdiction.

First, the displacement of state power in such a case would create a regulatory vacuum. The picketing here involved is not "conduct which is the subject of national regulation." The site chosen by a union to engage in primary picketing to protest the labor policies of a particular establishment is not a matter which is governed by Section 8 of the Act. Neither is the site chosen by non-labor pickets to engage in primary picketing to protest the quality or price of the merchandise sold, or the credit or employment policies followed, by that establishment. Yet, if in the latter context unreasonable interruption with business operations results from the picketing, the states would be empowered to fashion an appropriate remedy, whereas in the former case, if Petitioners' pre-emption contention is accepted, the states would be powerless to act. As in *International Association of Machinists* v. *Wisconsin*, 336 U.S. 618, 620, "[s]uch a desirable result, on the remote possibility of some entanglement with the Board's enforcement of the national labor policy, [should] require quite a more compelling indication of congressional

Algoma Plywood & Veneer Co. v. *Wisconsin*, 336 U.S. at 241.

will than can be found in the interstices of the Act."

Second, since the Petitioners conduct here involved was not subject to regulation by the Board at the instance of Respondent, the alternative to the exercise of state power is self-help and a concomitant imminent threat to the public order. It was this consideration which caused the court below to assert jurisdiction and, as noted by the court, which had previously motivated other state courts to similarly act. (App. to Pet. for Cert., pps. 15a-21a.) The situation is thus the same as that noted by this Court in *Linn* with respect to otherwise unremediable libel suits:

> "... ...the refusal to redress an otherwise actionable wrong creates disrespect for the law and encourages the victim to take matters into his own hands. The function of libel suits in preventing violence has long been recognized." (383 U.S. at 64, n. 6.)

The Court, therefore, concluded, as it should here, that the states' concern was "so deeply rooted in local feeling and responsibility" that it fits within the exception specifically carved out by *Garmon*. (p. 62.)

Third, the states have traditionally been permitted to take appropriate remediable action in labor picketing cases where the matter involved is one of "genuine local concern" such as "mass picketing, violence, and threats of violence."[20] They have also been allowed to

[20] E.g., *Hood v. Stafford*, 214 Tenn. 651, 383 S.W. 2d 760 (1964); *People v. Gadale*, 21 Ill. 2d 603, 174 N.E. 2d 387 (1961); and *Marshall Coop. v. Retail Store Employees Union*, 16 Wis. 2d 160, 114 N.W. 2d 376 (1962).

[21] *Auto Workers v. Wisconsin Employment Relations Board*, 351 U.S. 266.

"grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order . . . [and have been] allowed . . . to enjoin such conduct." [40] In each of these cases, as well as *Linn* and *Vaca*, the state assertion of power involved an underlying labor dispute which, in a different guise, could well have been within the ambit of the Act. That fact alone, however, was not there deemed determinative; nor should it be here.[41] The state courts clearly have sufficient expertise to solve the problem at hand.[42] And such state action would reflect no judgment upon the objectives of the union. It would not interfere with the Board's jurisdiction over the merits of the labor controversy.[43] As this Court observed in *Hanna Mining Co.* v. *District 2, MEBA*, 382 U.S. 181, 191, n. 13: ". . . sometimes offensive conduct may be restrained by a state remedy that has no impact at all on related activity arguably within the Board's exclusive province."

[40] *San Diego Building Trades Council* v. *Garmon*, 359 U.S. at page 247.

[41] The Board's *amicus* brief argues that the Board could be called upon to adjudicate the rights of Petitioners to engage in the picketing here involved (pp. 6-10). But the Board may similarly also be called upon, in a case involving mass picketing or violence on a picket line, to adjudicate the merits of that controversy, either in reaching a determination as to whether such conduct contravenes one of the prohibitions of Section 8 of the Act, or in determining whether the pickets' conduct is such as to bar their subsequent reemployment (*Thayer, Inc.*, 125 NLRB 222). The possibility of concurrent jurisdiction, therefore, is not sufficient in and of itself to oust state jurisdiction. *See Lockridge* v. *Motor Coach Employees*, —— Idaho ——, 72 LRRM 2703 (Oct. 15, 1969).

[42] As stated by this Court in *Vaca*: "it can be doubted whether the Board brings substantially greater expertise to bear on these problems than does the courts." 386 U.S. at 171.

[43] *Linn* v. *United Plant Guard Workers*, 383 U.S. at 64.

Fourth, the Board's contention that state regulation of the Petitioner's "use of the store's *exterior* premises"[44] would upset the federal regulatory scheme is subject to the same fatal defect as the Petitioners' attempt to invoke an "openness" standard to resolve Constitutional rights. It substitutes form for substance and is thus guilty of the very practice that Petitioners criticize Respondent for—the sizing of substantial rights "by a tape measure" (Pet. Br., p. 24).

The Petitioners and the Board are not advocating here, as they suggest, a well-established principle of labor relations but instead a novel and dangerous concept. The Act may have envisaged peaceful picketing as a legitimate weapon of organized labor. But this sanction in the past has never been construed to imply a right to engage in such picketing on private property. Otherwise, there would have been no necessity, for example, to regulate "common situs" picketing[45] or to have regulated the location of the pickets in *Logan Valley*[46]; a union would be free to enter upon a construction site or the premises of Weis Market to picket wherever it desired. The law, in short, is that "if an employer barred *all* nonemployees from his premises, thereby avoiding a finding of discrimination, *and* if he was willing to give the union an employee list, . . . he [could] then prevent access to his property".[47] The reason for this rule is clear: peaceful picketing

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[44] Brief of *amicus* NLRB, p. 13 (emphasis supplied).

[45] See the cases cited at fn. 23, *supra*.

[46] See the discussion at fn. 16, *supra*.

[47] Note *Nonemployee Union Organizers Granted Access to Company Property for Solicitation Purposes*, 67 Mich. L. Rev. 573 at n. 59 (January 1969).

must be conducted at such a location as to avoid substantial interference with the normal business use of the private property involved.

Why should there be any difference then—when there has been such substantial interference—as to whether such interference occurs on the exterior or interior portions of the property? In *Logan Valley*, the Board, as *amicus*, recognized that "a state has a legitimate interest in protecting private property against trespass" and conceded that if entry had been made upon the *interior* selling area of the Weis store, the interest of the state would be "so great and the danger of interference with the federal regulatory scheme . . . so slight, that the State would not be barred from acting."[48]

The same logic is also controlling in the instant case. Surely, substantial interference with a business use as the result of picketing on exterior sidewalks affects "interests deeply rooted in local feelings and responsibilities" to the same degree as does interference which takes place on an interior sales floor. And the danger of disruption of the federal regulatory scheme as the result of state regulation in such a case is surely similarly "slight". The appropriate question, therefore,

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[48] Brief of *amicus* NLRB in *Logan Valley*, p. 17. As the Board's brief in the instant case acknowledges, Board regulation of communication may occur on both the exterior and the interior premises of an establishment. *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793; *Stoddard-Quirk Mfg. Co.*, 138 NLRB 615. *Similarly, a Marlene Industries* type remedy, such as that discussed at page 15 of the Board's brief, may provide for union access at both the interior as well as the exterior portions of an employer's premises. See, e.g., *J. P. Stevens & Co.*, 157 NLRB 869, *mod. & enf.* 380 F.2d 292 (C.A. 2, 1967), *cert. den.* 389 U.S. 1005; *H. W. Elson Bottling Co.*, 155 NLRB 714, *mod. & enf.* 379 F.2d 223 (C.A. 6, 1967).

is not where the interference occurs but whether, in fact, interference has occurred. And where it has been found to have occurred, as in the instant case, there is no pre-emption of state jurisdiction.

III

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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